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No. 99-1408

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IN THE

Supreme Court of the United States

OCTOBER TERM, 2000

GAIL ATWATER, *et al.*,

Petitioners,

—v.—

CITY OF LAGO VISTA, *et al.*,

Respondents.

ON WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, THE ACLU OF TEXAS, THE MEXICAN-AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, AND THE NATIONAL POLICE ACCOUNTABILITY PROJECT OF THE NATIONAL LAWYERS GUILD, IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI* 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 3

ARGUMENT 6

CUSTODIAL ARREST FOR A FINE-ONLY OFFENSE, IN THE ABSENCE OF EXIGENT CIRCUMSTANCES, IS AN UNREASONABLE SEIZURE WITHIN THE MEANING OF THE FOURTH AMENDMENT 6

A. The History And Core Principles Of The Fourth Amendment Support Limitations On Custodial Arrest For Minor Offenses 6

B. The Reasonableness Of Custodial Arrests For Minor Offenses Must Be Judged Under The Court's Fourth Amendment Balancing Test 11

C. The Intrusiveness Of A Custodial Arrest Outweighs The State's Interests In Conducting Such Arrests For Fine-Only Offenses 15

D. Common Law Tradition Supports Prohibition Of Custodial Arrest For Fine-Only Offenses 18

Page

E. Prohibiting Arrest For Fine-Only Offenses Is Consistent With General Principles Of Constitutional Interpretation 26

CONCLUSION 30

TABLE OF AUTHORITIES

Page

Cases

Almeida-Sanchez v. United States,
413 U.S. 266 (1973) 7

Argersinger v. Hamlin,
407 U.S. 25 (1972) 5, 27

Austin v. United States,
509 U.S. 602 (1993) 28

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399 U.S. 66 (1970) 5, 27

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525 A.2d 197 (D.C.Ct.App. 1987) 8

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387 U.S. 527 (1967) 7

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267 U.S. 132 (1925) 18

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439 N.W.2d 562 (Wis. 1989) 13

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479 U.S. 367 (1987) 23

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500 U.S. 44 (1991) 15

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440 U.S. 648 (1979) 7, 12

Diaz v. City of Fitchburg,
176 F.3d 560 (1st Cir. 1999) 24

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442 U.S. 200 (1979) 11

Page

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95 F.Supp.2d 723 (N.D. Ohio 2000) 10

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690 F.2d 1133 (4th Cir. 1982) 8, 13

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495 U.S. 1 (1990) 23

Gerstein v. Pugh,
395 U.S. 103 (1975) 14

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797 F.2d 432 (7th Cir. 1986) 28

Gustafson v. Florida,
414 U.S. 260 (1973) 12, 15

Harmelin v. Michigan,
501 U.S. 957 (1991) 17

Higbee v. City of San Diego,
911 F.2d 377 (9th Cir. 1990) 13

Illinois v. Wardlow,
528 U.S. __,
120 S.Ct. 673 (2000) 4, 9

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372 U.S. 144 (1963) 28

Knowles v. Iowa,
525 U.S. 113 (1998) 11, 14

Martinez v. Village of Mount Prospect,
92 F.Supp.2d 780 (N.D. Ill. 2000) 9

Page

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472 U.S. 463 (1985) 12

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191 F.R.D. 52 (S.D.N.Y. 1999) 9

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453 U.S. 454 (1981) 15

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424 U.S. 693 (1976) 16

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445 U.S. 573 (1980) 7, 11, 14

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116 F.3d 288 (7th Cir. 1997),
cert. dism'd as improvidently granted,
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520 U.S. 385 (1997) 12

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89 F.Supp.2d 1131 (N.D. Cal. 2000) 9

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428 U.S. 364 (1976) 23

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451 U.S. 204 (1981) 12

Page

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401 U.S. 395 (1971) 15

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471 U.S. 1 (1985) 4, 12

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614 So.2d 468 (Fla. 1993) 8, 24

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469 U.S. 221 (1985) 12

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462 U.S. 696 (1983) 12

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No. 99-5970 (D.N.J.),
available at <http://www.usdoj.gov/
crt/split/documents/jerseysa.htm> 9

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423 U.S. 411 (1976) 19

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466 U.S. 740 (1984) . . . . . *passim*

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517 U.S. 806 (1996) . . . . . *passim*

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514 U.S. 927 (1995) 12

Page

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470 U.S. 753, 760 (1982) 12

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526 U.S. 295 (1999) 19

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Alaska Stat. §12.25.030(b)((2)(A) (Michie 1999) 22
Alaska Stat. §§12.25.030(1) (Michie 1999) 24
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725 Ill. Comp. Stat. Ann. 5/102-15 (West 2000) 24
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Ind. Code Ann. §33-1-12-1 (West 2000) 24
Ind. Code Ann. §35-33-1-1(a)(3) (Michie 2000) 22
Ind. Code Ann. §35-33-1-1(a)(4) (West 2000) 24
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Ky. Rev. Stat. Ann. §431.005(2)(a) (Michie 1998) 22
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La. Rev. Stat. Ann. §14.2(6) (West 1999) 24

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Mass. Ann. Laws ch. 276, §28 (West 1999) 22
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(West 1999) 24
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(West 1999) 23
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(West 1999) 24
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(West 1999) 24
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Mich. Comp. Laws Ann. §§764.15(1)(h)-(i)
(West 2000) 22

Page

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(McKinney 2000) 22

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(Anderson 2000) 22

Page

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Or. Rev. Stat. §161.515(1) (1999) 24
Or. Rev. Stat. §161.545 (1999) 24, 25
Or. Rev. Stat. §811.210(1)(a) (1999) 25
Or. Rev. Stat. §811.210(2)(b) (1999) 25
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R.I. Gen. Laws §12-7-3 (1999) 23, 24, 25
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(Michie 2000) 21, 24, 25
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Page

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W. Va. Code §62-10-6 (2000) 21
Wash. Rev. Code Ann. §9A.04.040(1) (1999) 25
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Page

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Page

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Page

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INTEREST OF *AMICI* [1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution. In support of these principles, the ACLU has appeared before this Court in numerous Fourth Amendment cases, both as direct counsel and as *amicus curiae*. The ACLU of Texas is one of its statewide affiliates. Because this case addresses an important Fourth Amendment question, its proper resolution is a matter of substantial concern to the ACLU and its members.

For over 35 years the Mexican American Legal Defense and Educational Fund (MALDEF) has fought to promote and protect the rights of Latinos in the United States. MALDEF's interest in Fourth Amendment issues stems from our Immigrant Rights and Access to Justice program areas, which currently monitor police conduct for compliance with the Fourth Amendment, and seek to address issues of racial/ethnic profiling by law enforcement agencies. MALDEF has a substantial interest in the proper resolution of this case, to ensure full protection of the rights of members of the Latino community.

The National Police Accountability Project of the National Lawyers Guild is dedicated to protecting all persons from the unlawful or unconstitutional use of police power. The Project provides information and resources necessary for police misconduct litigation and support for legislative efforts to strengthen remedies for victims of police abuse.

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

STATEMENT OF THE CASE

Gail Atwater was driving her two children home from soccer practice one afternoon, at a speed of fifteen miles per hour through a residential neighborhood in Lago Vista, Texas. None of the three was wearing a seat belt. Atwater was stopped by City of Lago Vista Police Officer Bart Turek, who screamed at her that they had met before (several months previously Turek had stopped Atwater, apparently suspecting that her son was riding in the car without a seat belt, which turned out not to be the case) and that this time she was going to jail. *Atwater v. City of Lago Vista*, 165 F.3d 380, 382 (5th Cir. 1999).

Texas law provides that failure to wear a seat belt is a misdemeanor, subject to a maximum punishment of $50. Texas Transp. Code Ann. §545.413(d) (West 1999). Texas law allowed Officer Turek the discretion to issue a citation for this offense, *id.* §543.005, or to make a custodial arrest, *id.* §543.001. Neither the statute nor Lago Vista police department policy provides any guidelines or criteria for officers on how to decide between a citation and an arrest in such circumstances. 165 F.3d at 383.

Officer Turek chose to arrest Atwater for the seat belt offense. After what was described by witnesses as a "tirade" on his part, Turek took Atwater into custody, handcuffing her behind her back, and refusing her request that she be allowed to take her six-year-old daughter and four-year-old son to a neighbor's house two houses away from where they were standing, rather than have them accompany her to jail. *Id.* at 382.[2] Atwater was taken to the police

[2] When Turek demanded Atwater's driver's license and proof of insurance card, Atwater replied that those documents were in a purse stolen several days previously. Turek subsequently added charges of (continued...)

station in Turek's squad car, where she was required to empty her pockets, remove her shoes and glasses, and have her picture taken. She then spent about an hour in a jail cell before being taken to a magistrate who released her when she posted bond. Her children were spared the trip to the station house when a neighbor happened on the scene.

Atwater pleaded no contest to the seat belt charge. Because this incident caused Atwater and her children extreme emotional distress, requiring medication and counseling, they brought an action pursuant to 42 U.S.C. §1983, alleging, *inter alia*, that Turek's arrest was an unreasonable seizure under the Fourth Amendment. The U. S. District Court for the Western District of Texas granted the defendants summary judgment, a panel of the Fifth Circuit reversed, 165 F.3d 380, and the Fifth Circuit *en banc* reversed the panel, holding that the arrest was not unconstitutional under current law. 195 F.3d 242 (1999).

SUMMARY OF ARGUMENT

The Fourth Amendment prohibits custodial arrest for fine-only misdemeanors, at least in the absence of exigent circumstances. The Texas statute authorizing custodial arrest for any violation of its traffic code resembles the general warrants that were one of the principal motivating factors

[2] (...continued)
driving without a license and insurance card to the original seat belt charge against Atwater, but these charges were dismissed on the same day they were filed. 195 F.3d 242, 252 (5th Cir. 1999)(*en banc*) (Dennis, J., dissenting). Under Texas law, driving without proof of insurance is neither a crime nor an offense, *see id.*, and failure to carry or exhibit a driver's license as a first offense is a fine-only misdemeanor, *see id.*, so even if the after-the-fact additional charges were deemed to have been legitimate, Ms. Atwater's arrest was still, at most, for a fine-only misdemeanor.

behind the American Revolution and the drafting of the Fourth Amendment. *See* Nelson B. Lasson, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION at 13-78 (1937).

The Fourth Amendment axiom that excessive police discretion can lead to arbitrary enforcement is demonstrated by Atwater's case; the potential for racially discriminatory enforcement, *see Illinois v. Wardlow*, 528 U.S. __, 120 S.Ct. 673, 677, 682 nn.9-10 (2000)(Stevens, J., dissenting), is even more alarming.

In *Whren v. United States*, 517 U.S. 806 (1996), the Court declined to question whether stops for traffic offenses are in fact pretexts to investigate suspected drug offenders. If there are no objective limitations on the more intrusive power to arrest, other than probable cause, states may, as some already have, authorize arrest for a vast array of offenses -- not only the entire traffic code, as in Texas, but littering, jaywalking and perhaps even parking violations. Law enforcement officers then have license to select anyone at all, wait for them to commit any one of thousands of possible infractions, and then place their target under arrest in order to conduct a search incident to arrest of the designated person and vehicle. Arrests would, in truth, become incident to the desired searches.

What is a "reasonable" seizure under the Fourth Amendment must be determined under the Court's usual balancing test, weighing the relative intrusion on individual interests against the state's legitimate needs. *Tennessee v. Garner*, 471 U.S. 1 (1985). The Fifth Circuit is incorrect in asserting that there is no need to apply the balancing test in this case, mischaracterizing dicta in *Whren*, 517 U.S. at 817, as assuming the result of a balance of interests not yet conducted. Presuming that the legislature may authorize officers to arrest for any trivial infraction, in addition to begging the question posed in this case, flies in the face of the

balance struck at common law, which authorized arrest only for fairly serious "misdemeanors" involving a breach of the peace, *see* 1 James F. Stephen, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 193 (London, MacMillian 1883); Horace L. Wilgus, "Arrest Without a Warrant," 22 Mich.L. Rev. 541, 572-77 (1923-24). Current "misdemeanors" or minor offenses which have actually led to custodial arrests, like eating on the subway, failure to have a bell or gong on one's bicycle, littering, and "walking as to create a hazard," radically expand the arrest authority granted at common law.

Custodial arrest is highly intrusive. It carries with it not only the automatic right to search an arrestee and his or her vehicle incident to the arrest, but also the right to use some degree of necessary force to effect the arrest, to transport the person to the police station, to handcuff, book and fingerprint the person, to detain the person for a period of time (presumably up to 48 hours) before presentation to a magistrate, and to maintain a record of the arrest.

On the other side of the balance, the state ordinarily has no real need to take an individual into custody for a fine-only offense. In a case like Atwater's, there was no breach of the peace, no reason to fear that Atwater would abscond, and no need whatever to arrest rather than issue a summons.

The legislature's choice not to impose any jail time for a code violation is the best indication of the state's level of interest in taking custody of individuals who violate such prohibitions. *Welsh v. Wisconsin*, 466 U.S. 740 (1984). In other areas of constitutional interpretation, the Court has deferred to the legislature's classification of offenses as fine-only or not, predicating the existence of rights like the right to counsel or right to jury trial on whether or not an offense leads to incarceration. *See Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Baldwin v. New York*, 399 U.S. 66 (1970). Prohibiting custodial arrest for fine-only offenses in the absence of exigent circumstances would provide a clear and conven-

ient bright-line rule for courts and police to follow, respecting a line created by the legislature rather than subjecting every arrest to after-the-fact scrutiny by the courts.

Arrest may not be used as a summary punishment, imposing jail time that no legislature has authorized.

ARGUMENT

CUSTODIAL ARREST FOR A FINE-ONLY OFFENSE, IN THE ABSENCE OF EXIGENT CIRCUMSTANCES, IS AN UNREASONABLE SEIZURE WITHIN THE MEANING OF THE FOURTH AMENDMENT

A. The History And Core Principles Of The Fourth Amendment Support Limitations On Custodial Arrest For Minor Offenses

Texas law delegates to every peace officer the power to arrest, and therefore to search incident to that arrest, *see United States v. Robinson*, 414 U.S. 218, 221-22 (1973), any person who has committed any infraction of its traffic code, Tex. Transp. Code Ann. §543.001 (West 1999), or any one of a broad array of other offenses. *See* Tex. Crim. P. Code Ann. §§14.01(a)-(b), 14.03 (2)-(4) (West 1998). No arrest warrant is required; no guidelines are provided.

This extravagant grant of discretionary authority is reminiscent of the general warrants the framers of the Fourth Amendment found so offensive. In fact, it was exactly such excessive delegations of the power to search and seize (like the statutes authorizing writs of assistance) that the Fourth Amendment was intended to prevent. *See* Jacob Landynski, SEARCH AND SEIZURE AND THE SUPREME COURT 30-42 (1966). It is by now familiar history that the framers' dismay at statutes granting such general preroga-

tives was one of the principal motivating factors, both for the Revolution and the creation of the Fourth Amendment itself. *See* Lasson, *supra*, at 13-78 (events during the thirty years preceding the drafting of the Fourth Amendment inspired the framers to elevate the principle of "reasonableness" to one of constitutional significance). The decisions of this Court consistently identify excessive police discretion as the central concern of the Fourth Amendment. *See Payton v. New York*, 445 U.S. 573, 583-85 (1980). "The essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of 'reasonableness' upon the exercise of discretion by government officials, in order to safeguard the privacy and security of individuals against arbitrary invasions." *Delaware v. Prouse*, 440 U.S. 648, 653-54 (1979). *See also Almeida-Sanchez v. United States*, 413 U.S. 266, 270 (1973); *United States v. Martinez-Fuerte*, 428 U.S. 543, 559 (1976); *Camara v. Municipal Court*, 387 U.S. 527, 532-33 (1967).

Recent history underscores the need to respect the Fourth Amendment's traditional concerns by imposing appropriate limitations on the discretion to arrest. In *Whren v. United States*, 517 U.S. 806, the Court declined to examine whether stops for traffic offenses were in fact pretexts to investigate suspected drug offenders, believing that it would be inappropriate as part of Fourth Amendment analysis to explore the subjective motivation of individual officers. If the Fourth Amendment is also construed as not imposing any objective limitations on the arrest power, other than probable cause, any state or municipal legislature may authorize custodial arrest for any "offense" at all, no matter how trivial, and the potential for abuse of discretion and selective enforcement is magnified exponentially.

This is more than a hypothetical concern. Infractions today's legislatures have already constituted as arrestable offenses, and which have actually led to full custodial ar-

rests, include, in addition to the Texas seat belt offense, eating on the subway, *see Fisher v. Washington Met. Area Transit Auth.*, 690 F.2d 1133 (4th Cir. 1982); failure to have a bell or gong on one's bicycle, *see Thomas v. Florida*, 614 So.2d 468 (Fla. 1993); failure to obtain a license for a telemarketing business, *see Ricci v. Village of Arlington Heights*, 116 F.3d 288 (7th Cir. 1997), *cert. dism'd as improvidently granted*, 523 U.S. 613 (1998); littering, *see United States v. Herring*, 35 F.Supp.2d 1253 (D. Or. 1999); and "walking as to create a hazard," *see Barnett v. United States*, 525 A.2d 197, 198 (D.C.Ct.App. 1987).

For some overzealous officers, the temptation to use this blanket authority to trawl for drug offenders could be overwhelming. Officers in permissive jurisdictions could target anyone at all, watch their target until she or he committed some infraction, even if only littering or jaywalking, and then claim the right to perform a search incident to a strategic arrest of the individual, and in cases of traffic offenses, search the individual's vehicle as well. If the opportunity to declare virtually anyone to be under arrest is too readily available, the search incident to arrest doctrine is effectively turned on its head, with arrests becoming incident to the real goal of suspicionless searches.

The facts of *Thomas v. Florida*, 614 So.2d 468, are instructive and alarming. Carl Thomas was riding his bicycle through a predominantly black neighborhood in Orlando known for drug activity. A local officer, apparently having no objective reason to stop Thomas on suspicion of any other criminal activity, arrested him for the offense of riding a bicycle not equipped with a bell or gong (under a city ordinance whose dubious validity under Florida law had not yet been litigated, apparently because it was so rarely enforced). Conducting a search incident to this ingenious arrest, the officer found a handgun in Thomas's pocket. *Id.* at 469. *Whren* instructs us not to inquire into the officer's

reason for suddenly deciding to enforce this vestigial ordinance.

While Atwater's case proves the conventional Fourth Amendment wisdom that excessive delegations of arrest authority can lead to arbitrary enforcement, or enforcement out of personal vendetta,[3] Thomas's case raises the specter of the rampant discriminatory enforcement that can take place in the absence of objective limits on legislative grants of arrest power, with its concomitant search power. Sadly, the fear that excessive grants of discretion will lead to racially discriminatory law enforcement is more than hypothetical. *See Illinois v. Wardlow*, 120 S.Ct. at 682 nn.9-10 (Stevens, J., dissenting). Historical prejudices against minorities, as well as more recent cultural prejudices against immigrants, find expression in unbridled discretion. Courts across the country are increasingly recognizing claims based on the practice of racial profiling, as that issue moves to the forefront of national consciousness.[4] It is not only in border

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[3] Judge Garza took judicial notice on the basis of his sixty years as a Texas lawyer that the usual procedure in Texas traffic stops is for the officer to issue a citation, 195 F.3d at 246 (Garza, R., J., dissenting), and concluded that Atwater was singled out for improper reasons.

[4] *See Martinez v. Village of Mount Prospect*, 92 F.Supp.2d 780 (N.D. Ill. 2000)(approving settlement agreement including enactment of policy banning racial profiling); *United States v. State of New Jersey*, No. 99-5970 (D.N.J.), available at <http://www.usdoj.gov/crt/split/documents/jerseysa.htm> (consent decree resolving U.S. Department of Justice racial profiling claim against New Jersey State Police); *Rodriguez v. California Highway Patrol*, 89 F.Supp.2d 1131 (N.D. Cal. 2000)(targeting of African-American and Latino drivers); *National Congress of Puerto Rican Rights v. City of New York*, 191 F.R.D. 52 (S.D.N.Y. 1999)(*Terry* stops targeting African-American and Latino individuals on the basis of race and national origin). *See generally* David Cole, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM (1999); Randall Kennedy, RACE, CRIME, AND THE LAW

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states like Texas that local police, frequently responding to community prejudices, single out people of Mexican appearance in order to check their immigration status. *See, e.g., Farm Labor Organizing Committee v. Ohio State Highway Patrol*, 95 F.Supp.2d 723, 737 (N.D. Ohio 2000). Custodial arrest, as a manner of seizure and as a means of initiating and subjecting individuals to process, must be subject to a reasonableness inquiry that balances governmental interests with an individual's Fourth Amendment interests, *see Atwater v. City of Lago Vista*, 195 F.3d at 247 (Garza, R., J., dissenting), 246-47 (Wiener, J., dissenting), 254 (Dennis, J., dissenting), if the courts are not to abdicate the responsibility of ensuring reasonably evenhanded law enforcement.[5]

The fear that legislatures will condone and encourage suspicionless searches is also more than hypothetical. The Iowa legislature, for example, in a candid attempt to spare individuals the burden of custodial arrest in circumstances where what the legislature really wanted was to allow otherwise impermissible searches of cars, tried to confer the power to search on all officers who stop people for traffic offenses, regardless of whether or not they conduct an arrest. Now that the Court has invalidated that effort to sever the arrest and its incident search, *Knowles v. Iowa*, 525 U.S. 113 (1998), state or municipal legislatures sharing the Iowa legislature's goal of permitting searches not based on probable cause must authorize, and insist on, custodial arrests rather than traffic citations. State or local jurisdictions will be encouraged to emulate Texas by permitting arrest for traffic offenses, perhaps even for parking violations, as a predicate for allowing their officers to conduct otherwise unjustifiable searches.

The searches and arrests in such cases must be deemed unreasonable within the meaning of the Fourth Amendment, both because of the excessive, unreasonable delegation of discretion, and because, on balance, the state's interest in enforcing minor offenses does not reasonably outweigh the individual's interest in liberty, privacy, and dignity.

B. The Reasonableness Of Custodial Arrests For Minor Offenses Must Be Judged Under The Court's Fourth Amendment Balancing Test

When Gail Atwater was transported to the police station, she was subjected to a full custodial arrest. *See Dunaway v. New York*, 442 U.S. 200, 213-14 (1979). Because this Court has always recognized that custodial arrest is the gravest intrusion on an individual's liberty and privacy, it has strictly observed the requirement that any arrest must be based on probable cause. *Id.* at 208. The Court has also found arrests to be unreasonable, even when based on probable cause, in a variety of cases, sometimes requiring arrest warrants as a precondition to a valid arrest, *see Payton v. New York*, 445 U.S. at 585 ("a warrantless arrest of a person is a species of seizure required by the Amendment to be reasonable"); *Welsh v. Wisconsin*, 466 U.S. 740 (warrantless home arrest for misdemeanor requires particularly exigent

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[4] (...continued)
(1997); David A. Harris, "The Stories, The Statistics, and the Law: Why 'Driving While Black Matters," 84 Minn.L.Rev. 265 (1999); David Cole, "Race, Policing, and the Future of Criminal Law," 26 Hum.Rts. 2 (Summer 1999); Dorothy E. Roberts, "Foreword: Race, Vagueness, and the Social Meaning of Order-Maintenance Policing," 89 J.Crim.L. & Criminology 775 (1999).

[5] The *Whren* Court suggested that any problem with discriminatory enforcement could be addressed through litigation under the Equal Protection Clause. *Id.* at 813. For an explanation of why equal protection claims are not an adequate substitute for control over excessive police discretion, *see* Brief *Amicus Curiae* of the American Civil Liberties Union in Support of Petitioners at 10-11 n.4, *Whren v. United States*, 517 U.S. 806 (1996)(No. 95-5841).

circumstances); *see also Steagald v. United States*, 451 U.S. 204 (1981)(search warrant required for arrest in another's home), and sometimes imposing limitations on the method of arrest, *see Tennessee v. Garner*, 471 U.S. 1 (limitation on use of deadly force in arrest); *Wilson v. Arkansas*, 514 U.S. 927 (1995)(knock-and-announce limitation on execution of warrants); *Richards v. Wisconsin*, 520 U.S. 385 (1997) (same).

As the Court has explained on many occasions, whether or not an arrest is reasonable must be determined by "balanc[ing] the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *Tennessee v. Garner*, 471 U.S. at 8. *See also United States v. Place*, 462 U.S. 696, 703 (1983); *Winston v. Lee*, 470 U.S. 753, 760 (1982); *United States v. Hensley*, 469 U.S. 221, 228 (1985); *Delaware v. Prouse*, 440 U.S. at 654; *United States v. Martinez-Fuerte*, 428 U.S. at 556-62.

While the Court has not yet addressed the question of what limitations the Fourth Amendment imposes on the power to arrest for minor offenses, a number of Justices have expressed concern about the need to limit the power to arrest under such circumstances. *See Gustafson v. Florida*, 414 U.S. 260, 266-67 (1973)(Stewart, J., concurring)("a persuasive claim might have been made . . . that the custodial arrest of the petitioner for a minor traffic offense violated his rights under the Fourth and Fourteenth Amendments"); *Robbins v. California*, 453 U.S. 420, 450 n.11 (1981) (Stevens, J., dissenting); *cf. Maryland v. Macon*, 472 U.S. 463, 471 (1985)("[w]e leave to another day the question whether the Fourth Amendment prohibits a warrantless arrest for the state law misdemeanor of distribution of obscene materials")(opinion of the Court by O'Connor, J.); *Welsh v. Wisconsin*, 466 U.S. at 749 n.11 (leaving open the question of whether warrantless arrest in the home for a nonjailable

offense is ever reasonable, even if exigent circumstances exist)(opinion of the Court by Brennan, J.). Three Terms ago, the Court granted *certiorari* in *Ricci v. Village of Arlington Heights*, 116 F.3d 288, to consider the question of whether petitioner's arrest for violation of a fine-only municipal ordinance by operating a telemarketing business without a license was an unreasonable seizure, but subsequently dismissed *certiorari* as improvidently granted, 523 U.S. 613 (1998)(No. 97-501).[6]

The *en banc* majority below took as dispositive of the *certiorari* question in this case, and in *Ricci*, dicta from the Court's decision in *Whren v. United States*, 517 U.S. at 817, commenting that if an arrest is based on probable cause, "with rare exceptions . . . the result of that balancing is not in doubt." *See* 195 F.3d at 243. While it is understandable that lower federal and state courts have been reluctant to venture into territory not previously charted by this Court, the dicta in *Whren* cannot be read as obviating the need to balance the state and individual interests in this case. First, what *Whren* found to be constitutionally reasonable was only a *stop* based on probable cause that a traffic offense was being committed, not an arrest. Whren was not placed under arrest until the officers observed illegal drugs in plain

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[6] The Court has left this question open for so long that some observers have assumed that the Court's inaction is an implicit rejection of the argument that the Fourth Amendment imposes limitations on the arrest power beyond probable cause. *See, e.g.*, Wayne R. LaFave, SEARCH AND SEIZURE §5.1(c) at 23 (3d ed. 1996); *Higbee v. City of San Diego*, 911 F.2d 377, 379 n.2 (9th Cir. 1990). Even if they do not simply assume the Fourth Amendment to be so limited, some state and lower federal courts have announced that they prefer to await the Supreme Court's lead rather than engaging in independent analysis of what common law requirements the Fourth Amendment incorporates with respect to arrest. *See, e.g., Fisher*, 690 F.3d at 1139 n.6; *City of Milwaukee v. Nelson*, 439 N.W.2d 562, 570 (Wis. 1989).

view during the traffic stop. 517 U.S. at 809. Second, although the Court remarked that the balancing analysis has been reserved for "extraordinary" or "extreme intrusions, *id.* at 818, the Court went on to list cases in which various limitations, usually gleaned from common law, were added to what had previously been assumed by the Court to be reasonable arrests.[7] Overreading the *Whren* dicta simply begs the question posed herein by assuming the result of a balancing not yet conducted.

The offenses for which custodial arrest was permitted at common law -- typically serious offenses involving breach of the peace, *see infra*, at pp.19-20 -- could indeed be presumed, on balance, to be reasonable occasions for custodial arrests. The state's interest in restoring the peace after a disruptive infraction could reasonably be viewed as presumptively outweighing the individual's interest in remaining free. Whether the state is entitled to the same presumption where an arrest is for failing to wear a seat belt or operating a business without a license is a question that has never been considered by this Court. It is because the world of regulatory offenses has proliferated in a manner the common law could not have imagined that it has become necessary for the courts to decide whether arrests for petty offenses are reasonable, instead of assuming that they are simply because a legislature or city council has granted the prerogative to arrest. Legislatures are not the final arbiter of what constitutes a reasonable arrest practice. *See Knowles v. Iowa*, 525 U.S. 113.

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[7] Before *Payton v. New York* was decided, for example, the Court declared that it had never "invalidated an arrest based on probable cause because the officers failed to secure a warrant," *see, e.g., Gerstein v. Pugh*, 395 U.S. 103, 113 (1975), and that probable cause was thus the only requirement for a valid arrest.

C. The Intrusiveness Of A Custodial Arrest Outweighs The State's Interests In Conducting Such Arrests For Fine-Only Offenses

Every arrest is a serious intrusion on individual liberty, privacy, and dignity. Incident to any lawful arrest, as described above, police may, with no additional showing, conduct a full search of the individual being arrested, including containers on their person, *United States v. Robinson*, 414 U.S. at 221-22, even for minor offenses and where there is no evidentiary purpose, *Gustafson v. Florida*, 414 U.S. 260 (driving without a license), and may search the passenger compartment, including containers, of an arrestee's vehicle, *see New York v. Belton*, 453 U.S. 454 (1981).

An arrestee, like Gail Atwater, may be publicly humiliated by being led away by the police, in handcuffs, in front of neighbors or strangers, and then frightened by being transported to the station house, where he or she may be booked and fingerprinted, and then detained without seeing a magistrate for up to 48 hours, and possibly even longer. *See County of Riverside v. McLaughlin*, 500 U.S. 44 (1991). Petitioner Atwater was held for only one hour; others less fortunate could be held for a substantially longer period of time, particularly if they are unable to secure bail or post a demanded bond.[8] Like Atwater, an arrestee may also have dependent children who might be forced to share their parent's humiliating and traumatic experience, or left without adequate care.[9]

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[8] This practice would have severe and potentially unconstitutional consequences for poor people. *See Tate v. Short*, 401 U.S. 395 (1971).

[9] There is little question in this case as to whether probable cause for the arrest actually existed -- Atwater admitted that she and her children were not wearing seatbelts, as the officer had personally observed. Permitting

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In addition to the serious intrusion on the arrestee's liberty and dignity, an arrest can continue to compromise privacy interests. Even in cases resulting in acquittal or dismissal, arrest records may be maintained and disseminated, further damaging the individual's reputation. *See Paul v. Davis*, 424 U.S. 693 (1976); Donald L. Doernberg & Donald H. Zeigler, "Due Process, Versus Data Processing: An Analysis of Computerized Criminal History Information Systems," 55 N.Y.U.L.Rev. 110, 114 (1980).

No legitimate interest of the state or city, on the other hand, was served by Atwater's arrest that would not have been as well served by issuance of a citation. Atwater did not create or threaten to create a breach of the peace. She did not refuse to identify herself or attempt to evade Officer Turek. She did not refuse to fasten her own and her children's seat belts when apprehended by Officer Turek; the officer did not request that she do so because he decided so precipitously to place her under arrest. The state's interest in assuring a defendant's presence for further proceedings can be satisfied in fine-only cases by issuing a summons for a code violation.[10] The less serious the offense, the less likely a defendant is to abscond. *See Welsh*, 466 U.S. at 759 (White, J., dissenting). In light of Atwater's unimpeachable roots in her community and the nature of her offense, it can scarcely be argued that the state had an interest in preventing her from absconding in order to avoid a $50

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[9] (...continued)
custodial arrest to be authorized for a vast array of minor infractions, however, would also allow arrests and two-day detentions even in cases where the existence of probable cause is highly questionable.

[10] *See* ALI Model Code of Pre-Arraignment Procedures §120.2 (1975); Barbara C. Salken, "The General Warrant of the Twentieth Century? A Fourth Amendment Solution to Unchecked Discretion to Arrest for Traffic Offenses," 62 Temple L.Rev. 221, 266-69 (1989).

fine. There was simply no legitimate need for the arrest.

The fact that this offense was deemed by the state legislature not to warrant any sentence of incarceration is an important factor affecting the balance of interests and rendering the arrest unreasonable. In *Welsh v. Wisconsin*, 466 U.S. at 750-53, the Court held that the gravity of an offense is a factor to be weighed in determining whether sufficient exigent circumstances exist to allow a warrantless arrest in the home. The fact that Welsh was being arrested for a nonjailable traffic offense, *see id.* at 742, was found to outweigh the state's interest in promptly entering his home in order to preserve evidence of his offense (driving while intoxicated). In fact, the Court left open the question of whether the Fourth Amendment should be interpreted to pose an absolute ban on warrantless home arrests for certain minor offenses, *id.* at 749 n.11, regardless of the existence of exigent circumstances. Rather than engage in the judicial evaluation of the severity of offenses that the dissenters in *Welsh* found objectionable, *id.* at 756, the Court can accept the legislature's own ranking of the severity of the offense and include that assessment in the balance. The state has defined the level of its own interest through its penalty decision. *See* pp.27-29, *infra*.

Respondents cannot argue that the purpose of this arrest was to attempt to deter Atwater from committing future violations by punishing her with a taste of custody, because decisions about what is an appropriate punishment must be made by a representative, politically accountable body. *Cf. Harmelin v. Michigan*, 501 U.S. 957, 962 (1991)(on legislative prerogative to decide punishment levels). In this case the legislature decided not to make any form of incarceration available as a sanction for seat belt violations, *see* Tex. Code §545.413(d), but then nevertheless delegated to its peace officers the power to single out individuals to be sent to jail rather than given a summons, *id.* at §§543.001,

543.005. Judge Wiener, dissenting from the *en banc* decision below, remarked that Officer Turek had acted as "a one-person cop cum judge cum jury cum executioner." 195 F.3d at 250. He could aptly have added "cum legislature."

An exigent circumstances exception to the rule that custodial arrest is not generally permitted for fine-only offenses would be more than sufficient to deal with those cases where a state does have a legitimate reason to arrest an individual for such an offense, perhaps because the individual is threatening a breach of the peace, or refuses to identify herself.[11] *See* Thomas R. Folk, "The Case for Constitutional Constraints Upon the Power to Make Full Custody Arrests," 48 U.Cin.L.Rev. 321 (1979)(arguing that custodial arrest for minor offenses should be confined to limited situations like these). What exigent circumstances would justify a custodial arrest for a fine-only offense is not a question that arises in this case, however, because there was no claim of exigency with respect to petitioner Atwater's arrest and no basis for any such claim.

D. Common Law Tradition Supports Prohibition Of Custodial Arrest For Fine-Only Offenses

This Court has often said that the "Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens." *Carroll v. United States*, 267 U.S. 132, 149 (1925). *Wyoming v. Houghton*, 526 U.S. 295, 299 (1999). This is not a case where logic must defer to history, *see United States v. Watson*, 423 U.S. 411, 429 (1976)(Powell, J., concurring), for logic is supported by history.

At common law, a summons procedure rather than custodial arrest was customarily used for minor offenses not constituting a breach of the peace. *See* Julius Goebel, Jr. & T. Raymond Naughton, LAW ENFORCEMENT IN COLONIAL NEW YORK 417 (1944)(Patterson Smith Reprint Series, 1970); Salken, *supra*, at 258-59 and authorities cited therein. Warrantless custodial arrest[12] was authorized for "misdemeanors" only if they constituted a breach of the peace and occurred in the officer's presence. *See* Stephen, *supra*, at 193 ("The common law did not authorise the arrest of persons guilty or suspected of misdemeanours, except in cases of an actual breach of the peace either by an affray or by violence to an individual"); 1 Joseph Chitty, A PRACTICAL TREATISE ON THE CRIMINAL LAW 15 (1816)(Garland Publishing, Inc. 1978)("no person can, in general, be taken into custody without warrant, for a mere misdemeanour unattended with violence, as perjury or libel"); 4 William Blackstone, COMMENTARIES *289; Matthew Hale, PLEAS OF THE CROWN: A METHODICAL SUMMARY 92 (1678)(P. R. Glazebrook ed., Professional Books Ltd. 1972)("in case of any other breach of the peace, the Constable may imprison the party in the Stocks, in the Goal [sic], or in his House, till he can bring him before a Justice of the Peace"); Edward C.

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[11] In many cases where an individual's conduct threatens a breach of the peace or defies an officer's authority, that individual might be subject to arrest for a separate offense like disorderly conduct, obstruction of justice, or refusal to identify oneself, depending on the legislature's treatment of those offenses.

[12] This case does not raise the question of whether obtaining an arrest warrant would permit an officer to conduct a custodial arrest for a fine-only misdemeanor, or for an offense not constituting a breach of the peace. The *en banc* court below, in fact, found that Atwater had procedurally defaulted any claim of a right to an arrest warrant. 195 F.3d at 245 n.3.

Fisher, LAWS OF ARREST 125 (1967); Wayne R. LaFave, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY 17 (1965); William A. Schroeder, "Warrantless Misdemeanor Arrests and the Fourth Amendment," 58 Mo.L.Rev. 771, 774-75 (1993). Arrest for minor offenses (those triable by a magistrate alone and not by a jury) was not sanctioned for the purpose of apprehending suspects, but rather to restore the peace. Stephen, *supra*, at 193. According to other sources, so great was the American colonists' antipathy to unnecessary custodial arrests that even magistrates were required, in cases involving only such minor offenses, to proceed by summons rather than by issuing an arrest warrant. Floyd Feeney, THE POLICE AND PRETRIAL RELEASE 12 (Lexington 1982); Goebel & Naughton, *supra*. As one recent history concluded, the framers of the Fourth Amendment would have perceived peace officers as possessing little "significant ex officio discretionary arrest or search authority." Thomas Y. Davies, "Recovering the Original Fourth Amendment," 98 Mich.L. Rev. 547, 640 (1999).

The "misdemeanors" for which common law allowed custodial arrest were generally serious offenses, including assaults and other dangerous and disruptive acts, or public disturbances. *See* Wilgus, *supra*, at 572-77 (listing offenses covered); Davies, *supra*, at 630 & n.220. As new offenses were created and the domain of the criminal law expanded, some statutes eroded the common law and extended the arrest authority to what Wilgus termed "public torts," 22 Mich.L.Rev. at 576-77, and even to traffic violations like petitioner's. *See* Fisher, *supra*, at 128; Schroeder, *supra*, at 775; Sam B. Warner, "Uniform Arrest Act," 28 Va.L.Rev. 315, 331-36 (1942). It is these new regulatory and quasi-civil offenses, mostly unknown to the common law, that are likely to be punishable only by fine, like petitioner's infraction. Use of the arrest power for such offenses, even

if authorized by state legislatures, constitutes a dramatic expansion of common law arrest authority.[13] The framers of the Fourth Amendment, offended by undue grants of discretion to search and arrest for common law offenses, did not have occasion to consider whether they would have been equally offended by random or politically motivated arrests for a wide variety of trivial matters, because such arrests were not within their experience. It seems likely that they would have found such practices as least as objectionable.

A number of contemporary statutes share at least some of the approach of the common law, seeking to limit custodial arrest for nonfelonies to instances where there is an actual need to arrest. Some states have explicitly codified the common law requirement that warrantless arrests may only be conducted for misdemeanors occurring in the presence of the officer if they are breaches of the peace.[14] Many other states retain the common law rule permitting warrantless arrests for misdemeanors only if they are committed within the arresting officer's presence, without explicitly mentioning the common law's breach of the peace

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[13] *See* Francis H. Bohlen, "Arrest With and Without a Warrant," 75 U. Pa.L.Rev. 485, 491 (1927)(finding "appalling" the notion that the traditional common law power to arrest for breaches of the peace might be expanded to municipal ordinance violations).

[14] *See* Miss. Code Ann. §99-3-7(1) (1999); W. Va. Code §62-10-6 (2000)(equivalent limitation on constables, not sheriffs). Some statutes limit the right to arrest to "public offenses" committed within the officer's presence, *see* Ala. Code §15-10-3(a)(1) (1999)("public offense" or "breach of the peace"); Ark. Code Ann. §16-81-106(b)(2) (Michie 1999); Cal. Penal Code §836(a)(1) (West 2000); Idaho Code §19-603(1) (1999); Iowa Code Ann. §804.7(1) (West 1999); Minn. Stat. Ann. §629.34(1)(c)(1) (West 1999); Nev. Rev. Stat. Ann. §171.124(1)(a) (Michie 1999); N.D. Cent. Code §29-06-15(1)(a) (1999); Okla. Stat. Ann. tit. 22, §196(1) (West. 1999); S.D. Codified Laws §23A-3-2(1) (Michie 2000); Tenn. Code Ann. §40-7-103(a)(1) (1999)("public offense" or "breach of the peace"); Utah Code Ann. §77-7-2(1) (1999).

requirement, but incorporate some of the spirit of that limitation by allowing arrest for misdemeanors committed outside an officer's presence only for designated offenses, usually more serious misdemeanors entailing violence or a threat of violence.[15] *See* LaFave, SEARCH & SEIZURE, *supra*, §5.1(b) at 13-14.

Beyond breach of the peace and presence requirements, some state statutes prescribe generalized criteria to guide officers in determining whether an immediate arrest is necessary, thus addressing the problem of undue delegation of discretion. Such statutes may require a reasonable belief that the suspect (1) will not be apprehended unless immediately arrested, (2) may cause personal injury or property damage, (3) will destroy evidence, or (4) will persist in refusing to identify himself or herself and therefore cannot be issued a summons.[16] While these statutes do impose some control on police discretion to arrest, they nevertheless vastly expand the authority conferred by common law, because the "offenses" or "misdemeanors" now included cover a kaleidoscopic array of new quasi-civil matters.[17]

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[15] *See* Alaska Stat. §12.25.030(b)((2)(A) (Michie 1999); Del. Code Ann. tit. 11, §§1904(a)(4)-(6) (1999); Fla. Stat. Ann. §§901.15(6)-(9) (West 1999); Ga. Code Ann. §17-4-20(a) (1999); Ind. Code Ann. §§35-33-1-1(a)(3), (5) (Michie 2000); Kan. Stat. Ann. §22-2401(c)(2)(C) (West 1999); Ky. Rev. Stat. Ann. §431.005(1)(e), (2)(a) (Michie 1998); Me. Rev. Stat. Ann. tit. 17-A, §15(1)(A) (West 1999); Mass. Ann. Laws ch. 276, §28 (West 1999); Mich. Comp. Laws Ann. §764.15(1)(m) (West 2000); Neb. Rev. Stat. §29-404.02(3) (1999); N.H. Rev. Stat. Ann. §594.10(1)(b) (1999); N.M. Stat. Ann. §31-1-7(A) (Michie 2000); N.Y. Crim. Proc. Law §140.10(1)(b) (McKinney 2000) (misdemeanors, not offenses); N.C. Gen. Stat. §15A-401(b)(2)(d) (2000); Ohio Rev. Code Ann. §2935.03(B)(1) (Anderson 2000); Or. Rev. Stat. §133.310(6)(a) (1999); Tex. Crim. P. Code. Ann. §§14.01(a)-(b), 14.03(2)-(4) (West 1998); Vt. R. Crim. P. 3(a)(2)(C) (2000); Va. Code Ann. §19.2-81(7) (Michie 2000); Wash. Rev. Code Ann. §10.31.100(1)-(2) (West. 1999), or for dangerous traffic violations, like driving while intoxicated or reckless driving, *see* Mich. Comp. Laws Ann. §764.15(1)(h)-(i) (West 2000); N.J. Stat. Ann. §39:5-25 (West 2000); N.D. Cent. Code §29-06-15(1)(f) (1999); Or. Rev. Stat. §133.310(1)(d)-(g) (1999); Wash. Rev. Code Ann. §10.31.100(3)-(4) (West 1999).

When the issue, as in many of these state statutory schemes, is whether or not to require an arrest warrant before a custodial arrest, the presence requirement provides a fair measure of alternative protection to the breach of the peace requirement. When the question, as in this case, however, is not just whether an arrest warrant is necessary, but whether an arrest is, on balance, reasonable in the enforcement of petty regulatory offenses unknown to the common law, the presence requirement by itself is inadequate to protect against overuse of the arrest power.

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[16] *See, e.g.*, Del. Code Ann. tit. 11, §1904(a)(2) (1999); Kan. Stat. Ann. §22-2401(c)(2)(A)-(C) (West 1999); Me. Rev. Stat. Ann. tit. 17-A §15(1)(a)(5)-(8) (West 1999); Mont. Code Ann. §46-6-311(1) (1999); Neb. Rev. Stat. §29-404.02(2) (1999); N.H. Rev. Stat. Ann. §594.10(1)(c) (1999); N.C. Gen. Stat. §15A-401(b)(2)(b) (2000); R.I. Gen. Laws §12-7-3 (1999); Utah Code Ann. §77-7-2(3) (1999); Vt. R. Crim. P. 3(a)(3)-(4) (2000); Wyo. Stat. Ann. §7-2-102(b)(iii) (Michie 2000); *see* ALI Model Code of Pre-Arraignment Procedures §120.1 (1975). Some statutes require both particularly dangerous offenses and risk of flight, injury, etc., *see* D.C. Code Ann. §23-581(a)(1)(C), (2) (1996); Md. Code Ann. art. 27 §594B(e), (f) (1996).

[17] This Court has held in cases concerning inventory searches of impounded automobiles that the Fourth Amendment's concern about undue delegation of discretion may be satisfied by requiring the states to provide criteria for the police to follow in deciding whether to conduct such searches. *See Florida v. Wells*, 495 U.S. 1 (1990); *Colorado v. Bertine*, 479 U.S. 367, 375 (1987); *South Dakota v. Opperman*, 428 U.S. 364, 369, 372, 379 (1976). A similar rule concerning the power of custodial arrest, requiring the states to create their own criteria or guidelines for arresting officers, would partially address the problem of arbitrary and discriminatory law enforcement. Such a rule would not be adequate, however, to prevent state statutes from authorizing arrests that are not, on balance, reasonable. The courts must decide what exigencies will permit appropriate exceptions to the rule disfavoring arrests for fine-only offenses. Legislatures, having shown themselves willing to authorize discretionary arrests for minor matters, might well posit that exigent cir-

(continued...)

At least eight states' statutory schemes appear to have addressed this problem head-on, categorically prohibiting custodial arrests for fine-only offenses.[18] The legislatures of about half the states, unlike Texas, do not authorize custodial arrest for a fine-only seat belt offense.[19]

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[17] (...continued)
cumstances exist any time arrest would further the purpose of the statute or ordinance in question, *see Diaz v. City of Fitchburg*, 176 F.3d 560, 563 (1st Cir. 1999). Such circular reasoning would evade the question of whether an arrest performed solely in order to further the purposes of an ordinance prohibiting obstruction of a passageway, jaywalking, or littering is reasonable.

[18] *See* Alaska Stat. §§12.25.030(1), 11.81.900(b)(9), (b)(58) (Michie 1999); Del. Code Ann. tit. 11, §§1904(a), 233(c), 4207 (1999); Ky. Rev. Stat. Ann. §§431.005(d), 431.060(2)-(3) (Michie 1998); Me. Rev. Stat. Ann. tit. 17-A, §15(1)(B) (West 1999), & Me. Rev. Stat. Ann. tit. 17-A, §4-B(3) (West 1999); Or. Rev. Stat. §§133.310(1)(b), (d), 161.515(1), 161.545 (1999); Pa. R. Crim. P. 101(2)(a), (c) (West 1999), 18 Pa. Cons. Stat. Ann. §106(b)(8) (West 1999); R.I. Gen. Laws §§12-7-3, 11-1-2 (1999); S.D. Codified Laws §§23A-3-2(1), 22-6-7 (Michie 2000). In many states, it is impossible to determine from published state statutes whether custodial arrest is permitted for fine-only offenses.

[19] *See* Alaska Stat. §§12.25.030(a)(1), 11.81.900(b)(9), 28.05.095, 28.05.99 (1999); Del. Code Ann. tit. 11, §1904(a)(1), 233(c) (1999), Del. Code Ann. tit. 21, §4802(g)(1) (1999); Fla. Stat. Ann. §§901.15(1), 775.08(2)-(3), 316.614(5), (8), 318.13(3), 318.14(1) (West 1999); *see also Thomas v. Florida*, 614 So.2d at 471; Ga. Code Ann. §§17-4-20(a), 40-8-76.1(b), (e)(1) (1999); 725 Ill. Comp. Stat. Ann. 5/107-2, 625 Ill. Comp. Stat. Ann. 5/12-603(d), 725 Ill. Comp. Stat. Ann. 5/102-15 (West 2000); Ind. Code Ann. §§35-33-1-1(a)(4), 33-1-12-1, 9-19-10-2 (West 2000); Ky Rev. Stat. Ann. §§431.005(1)(d), 431.060(3), 189.125(6) (Michie 1998); La. Code Crim. Proc. Ann. art. 213 (1), art. 933(1), (4) (West 1999), La. Rev. Stat. Ann. §14.2(6), 14.7, 32:295.1(A)(1) (West 1999); Me. Rev. Stat. Ann. tit. 17-A, §15(1)(A)(2), §4-B(1)-(3) (West 1999), Me. Rev. Stat. Ann. tit. 29-A §2081 (3-A), (D), §101(85) (West 1999); Md. Ann. Code art. 27, §594B(a) (1999), Md. Code Ann., Transp. §§22-412.3(b), 27-101(a)(2), 27-106(b) (1999); Mass. Gen. (continued...)

The legislative attempts to circumscribe the arrest power with respect to minor offenses, although not consistently as

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[19] (...continued)
Laws Ann. ch. 276, §28, Mass. Gen. Laws Ann. ch. 90, §13A (West 1999); Mich. Comp. Laws Ann. §§764.15(1)(a), 257.710e(3), (7), 257.6a, 257.907(2) (West 1999); Mont. Code Ann. §§46-6-311(1), 46-1-202(14), 45-2-101(48), 61-13-103(1), 61-13-104(1) (1999); Neb. Rev. Stat. Ann. §29-404.02(2) (1999), Neb. Rev. Stat. Ann. §60-6,270(1) (1999), Neb. Rev. Stat. §60-60,272 (1999); N.C. Gen. Stat. §§15A-401(b)(1)-(2)(b), 20-135.2A(e), 14-3.1(a) (2000); Or. Rev. Stat. §§133.310(1)(a)-(d), 161.515, 161.545, 811.210(1)(a), (2)(b), (3) (1999); Pa. R. Crim. P. 101(2)(a), 18 Pa. Stat. Ann. §106(b)(1)-(9) (a misdemeanor must carry the possibility of a minimum term of imprisonment to constitute arrestable offense), 75 Pa. Stat. Ann. §§4581(2), (3)(b) (2000); R.I. Gen. Laws §§12-7-3, 11-1-2, 31-22-22(g), (j) (1999); S.C. Code Ann. §§56-5-6520, 56-5-6540 (Law. Co-Op. 1999)("no custodial arrest for a violation of [the seat belt laws] may be made"); S.D. Codified Laws §§23A-3-2(1), 32-38-1, 32-38-5 (Michie 2000); Tenn. Code Ann. §55–9-603 (1999)("a law enforcement officer observing a violation [of the seat belt laws] shall issue a citation to the violator, but shall not arrest or take into custody any person solely for a violation of [the seat belt laws]"); Utah Code Ann. §§77-7-2(1), 76-1-601(6), 41-6-182(2), 41-6-185(1) (1999); Va. Code Ann. §§19.2-81(7), 46.2-1094(A), (G), 46.2-113, 18.2-8 (Michie 2000); Wash. Rev. Code Ann. §§10.21.100, 9A.04.040(1), 46.61.688(3), (5), 46.63.110(1) (1999). According to one source, although seat belts were required in 49 states, 36 states prohibited their officers from stopping drivers for a seat belt violation, allowing enforcement of seat belt laws only if motorists were stopped on suspicion of some more serious offense. *See* Timothy O'Neill, *No Stops for Seat Belts*, Chi. Trib., Mar. 28, 1999, at 20.

While a number of states do seem to permit custodial arrests for a violation of a fine-only seat belt law, it is difficult to provide an exact count, as the statutes of other states (Hawaii, Nevada, New York, North Dakota and Vermont) are unclear. Texas is unusually explicit in providing officers with blanket authority to arrest an individual for any traffic infraction in its code. *See* Tex. Transp. Code Ann. §543.001 (West 1999)("any peace officer may arrest without warrant a person found committing a violation of this subtitle [Rules of the Road]").

vigilant as the common law, bolster the conclusion that it is not reasonable within the meaning of the Fourth Amendment for a state to give vast and unchecked power to the police to arrest for minor regulatory offenses. However, the more permissive statutes, like those in Texas, which radically expand common law authority, demonstrate that the courts cannot optimistically defer to all legislative judgments about when arrest is reasonable.

Requiring the police, in the absence of exigent circumstances, to issue citations for minor, regulatory offenses rather than allowing them the power to arrest and search every traffic offender, jaywalker, or litterer, would obviate unreasonable arrests and would prevent widespread and inevitable problems of arbitrary and discriminatory enforcement from developing. Wayne R. LaFave, "'Case-by-Case Adjudication' Versus 'Standardized Procedures': The Robinson Dilemma," 1974 Sup.Ct.Rev. 127, 158, 162 (the most straightforward and most efficient control "in an area with a high potential for abuse" is to limit the circumstances under which an arrest is permissible).

E. Prohibiting Arrest For Fine-Only Offenses Is Consistent With General Principles Of Constitutional Interpretation

The courts could satisfy their responsibility to ensure that there are meaningful limits on police discretion to arrest by simply ruling that custodial arrest for minor offenses is allowed whenever the individual arrest is reasonable in light of all the facts -- a case-by-case approach that would weigh the nature of the intrusion (including such facts as how many hours the suspect was actually held, whether handcuffs or shackles were used, whether the suspect was given food, etc.), against the state's interests, including an evaluation of the seriousness of the offense. Atwater's arrest, as described above, would have to be deemed unreasonable under such an approach. On the other hand, ruling that it is generally unreasonable to arrest for a fine-only offense would provide a clear and consistent rule, would allow the courts to avoid the unnecessary burden of evaluating each misdemeanor arrest individually (unless there were a claim of actual exigency), and would honor the state's own assessment of the severity of the offense.

A state's decision about how an offense is to be punished is the "best indication of the state's interest in precipitating an arrest, and is one that can be easily identified." *Welsh v. Wisconsin*, 466 U.S. at 754. *See generally* LaFave, "Case-by-Case Adjudication," *supra*. Using the legislature's own decision about the range of permissible punishment as the basis for circumscribing the arrest power respects the legislature's authority in an appropriate manner. In interpreting other provisions of the Bill of Rights, the Court has declined to create its own taxonomy of the seriousness of offenses, relying instead on legislative decisions that an offense should be punished only by a fine as dispositive of whether certain constitutional protections attach during the prosecution of that offense. The Court has held, for example, that an individual has a right to counsel under the Sixth and Fourteenth Amendments only in connection with offenses that subject that individual to incarceration, *see Argersinger v. Hamlin*, 407 U.S. 25; *Scott v. Illinois*, 440 U.S. 367 (1979). The individual does not gain a right to counsel even if subjected to enormous fines, or other serious consequences not involving incarceration. *See Argersinger*, 407 U.S. at 44 (Powell, J., concurring). Similarly, the right to a jury trial under the Sixth and Fourteenth Amendments is contingent on the legislature's determination of the level of punishment appropriate upon conviction of an offense, *Baldwin v. New York*, 399 U.S. 66 (defendant has the right to a trial by jury if the offense to be tried is punishable by at least six months incarceration), not on what offenses the courts consider to be "serious," and not on whether the legis-

lature describes its offenses as "felonies" or "misdemeanors."

The Court adopted this approach recognizing that it would be difficult to predicate the existence of constitutional rights on whether particular offenses are labeled as "felonies" or "misdemeanors," because definitions of these terms vary greatly among the states. *Welsh v. Wisconsin*, 466 U.S. at 761 (White, J., dissenting). Likewise, what is a "misdemeanor" in one state is a "petty offense" or "violation" in another. What is a "crime" in one state is a civil matter in others.[20] In the context of evaluating the reasonableness of arrests, as elsewhere, it would not be feasible to adopt a constitutional rule based on legislative labeling of the category, status, or nature of an offense. The level of punishment attached to an offense is the only consistent, easily ascertained indicator of the weight of the state's interest.

The fine-only distinction also serves the important function of preventing unauthorized and disproportionate punishment for an offense. Once a legislature has decided not to allow any possibility of incarceration upon conviction of an offense, it should be impermissible for an individual who is only suspected of committing that offense to be locked up, even for 48 hours or less, at least in the absence of truly exigent circumstances. As Judge Easterbrook has remarked, "[m]ost reports of misdemeanors will not produce a sentence of custody . . . so a custodial arrest becomes a substantial part of the punishment." *Gramenos v. Jewel Companies, Inc.*, 797 F.2d 432, 441 (7th Cir. 1986). *See* Malcolm M. Feeley, THE PROCESS IS THE PUNISHMENT 46-47 (1979). Decisions about the appropriate punishments for offenses must be made by legislators who, unlike individual police officers, are politically accountable.

Respecting legislative judgments about the seriousness of an offense does not, of course, entitle the states to evade the Fourth Amendment requirement of reasonableness by the simple expedient of amending every ordinance in their arsenal to include a possibility of jail time, no matter how theoretical. If legislatures authorize incarceration and therefore arrest for truly trivial matters, the Court might then have to consider whether to interpret the Fourth Amendment as also incorporating the common law rule that arrests for minor offenses are impermissible in the absence of a breach of the peace, *see* pp.19-20, *supra*, or some other constraint on police discretion. While legislatures' evaluations of their own goals in criminal law enforcement are properly consulted in locating the baseline for what is reasonable, the Fourth Amendment, like its counterparts in the Bill of Rights, must sometimes be countermajoritarian.

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[20] This Court has previously held in several contexts that a state legislature's own description of its statutes as being "criminal" or "civil" is not dispositive, *see Austin v. United States*, 509 U.S. 602 (1993); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), so attempting to define arrest authority on the basis of whether a state denominates an offense as "criminal" would also be unavailing.

CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be reversed.

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